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In The

Supreme Court of the United States

October Term, 1998

JOHN G. GOWAN,

Petitioner,

vs.

UNITED STATES AIR FORCE

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the 10th Circuit

PETITION FOR A WRIT OF CERTIORARI

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74 pp

QUESTIONS PRESENTED

I. Whether the Court committed reversible error by failing to find that the "mean-spirited" attack on Major Gowan for his advocacy of civil rights was carried out through violations of the Privacy Act of 1974.

II. Whether the Court committed reversible error by failing to find that the Air Force creation and maintenance of false records about Major Gowan was a violation of the Privacy Act of 1974.

III. Whether the Court committed reversible error by failing to find that the Air Force failed to collect information to the greatest extent practicable directly from Major Gowan and in so doing violated the Privacy Act of 1974.

IV. Whether the Court committed reversible error by failing to find that the Air Force failed to grant access, amendment, and right to file a statement of disagreement to Major Gowan and in so doing violated the Privacy Act of 1974.

V. Whether the Court committed reversible error by failing to find that the Air Force did not make a reasonable effort to assure that records about Major Gowan were properly protected and that they were accurate, relevant, timely, and complete before they were used or disseminated and in so doing violated the Privacy Act of 1974.

VI. Whether the Court committed reversible error by failing to find that Major Gowan's First and Fourth Amendment Constitutional rights have been violated by the Air Force creation and maintenance of record which show how he exercises those rights and in so doing violated the Privacy Act.

VII. Whether the Court committed reversible error by failing to find that Major Gowan substantially prevailed in the action brought against the Air Force and whether financial and emotionally damaged was caused by Air Force violations of the Privacy Act of 1974.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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UNITED STATES AIR FORCE

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Petition for a Writ of Certiorari to the United States Court of Appeals for the 10th Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, John Griffin Gowan, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at

http://lawlib.wuacc.edu/ca10/cases/1998/07/96-2134.htm and is reproduced in the Appendix A.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgement on 17 July 1998. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

STATUTE INVOLVED

The pertinent provisions of Title V, United States Code, as amended by the addition of Section 552a, The Privacy Act of 1974 (Public Law 93-579).

STATEMENT OF THE CASE

Major Gowan was working on Kirtland AFB, NM as a Materials Engineer for the Air Force Weapons Laboratory (Appendix D-2,4,5,6,7). In addition to his duties as an engineer, he began to act, under the regulations, as the employee representative for others working at the base who were complaining of unlawful employment discrimination. (D-18,23) The complaints were largely against commanders and their representative, the Staff Judge Advocate, Lt Col Charles L. Brower. During this same period, junior officers in Gowan's organization began disclosing to him acts of fraud, waste and abuse in the Weapons Laboratory, commanded by Col John P. Amor. Gowan made many good faith efforts to resolve the problems without seeking help outside command. When these failed he reported the wrongdoing to the FBI. One of the cases of employment discrimination named Major General Bernard Weiss and Brower as discriminating officials. Gowan tried to resolve the complaint by offering a compromise plan to Brower in which Mr Maximo Hernandez stated that he was willing to abandon his complaints of discrimination, if Weiss would consent to his reassignment. The plan was flatly rejected. This started a chain of events that led to an

intentional and willful attack on Gowan that was orchestrated by Brower and supported by Weiss. They had no trouble enlisting Amor into their plan to prevent Gowan from continuing to support Hernandez in his lawful complaints. Brower sought, and got, support from Judge Advocates Major Randall H. Kehl, Capt William Gampel, Major Mark Ruppert and George P. Elder. Amor used a subordinate administrative officer, Lt Col Richard Steele. These staff officers were selected because they could be easily manipulated by Brower and Amor. Kehl had twice approved an off-duty employment request for Gowan to work in a private business in preparation for retirement.(D-27,33,35,36,45,46) The Air Force normally encourages preparation for retirement. Brower sent Kehl to the Air Force Office of Special Investigation (AFOSI) to make the allegation that Gowan was hiding technology that he had discovered in the course of his duties and planning to use it for private gain when he retired. (D-9,12,15,17) Kehl's statement to the AFOSI is as Appendix C,g. The written statement is mostly true, but it conflicts materially with the statement he invented to perpetuate the attack on Gowan after the OSI investigation failed to find wrongdoing. The later statements that were reported to Congress, claimed that Gowan said, at the off-duty interview, he was going to be working on "T'shirt embossing." It would have been a simple matter for the Air Force to check Kehl's original statement to the OSI when Gowan pointed out the difference. The AFOSI did conduct an investigation and went as far a Norway in the collection of records. (D-54,56,60,61,66) After four months, they concluded that Gowan had done nothing wrong and closed the investigation. (D-61) None of the Judge Advocate officers made any attempt to obtain information from Gowan. The information the AFOSI did collect was available in New Mexico from several sources. The OSI asked Gowan for a statement when they called him in to tell him they were closing the investigation. The findings of the AFOSI did not please Brower. (D-66,68,71,74) He sent Kehl and Gampel to Steele with the allegation that Gowan had committed a violation of the Air Force

Standards of Conduct regulation. (D-84) Steele was easily persuaded to accept the charges that were fabricated by the judge advocates, without any proof or personal knowledge. On 29 Jan 88 they filed criminal charges. Gowan was providing testimony to an EEOC investigator in the Hernandez case concerning Brower and Weiss, when he was called to Steele's office and told that court martial charges were going to be preferred against him. (D-76) From that point dozens of false records were generated by the judge advocate attorneys against Gowan. His security clearance was suspended, his retirement date was cancelled, and he was removed from his managerial role. (D-86) Gowan made a request to obtain a copy of the AFOSI report under the Privacy Act; after an initial denial, an unredacted copy was provided, but only after the charges had been preferred. The Air Force had no evidence of any wrongdoing on the part of Gowan. Daniel M. Rondeau, Gowan's business partner, was not charged even though he was the President of the partnership that the Air Force was claiming as the basis for the charges against Gowan. Unlike Gowan, Rondeau was not engaging in any protected activity. They did not want to go to Gowan for information because they knew that he would have provided exculpatory information which would have foreclosed any further pursuit of charges and fabrication of false information. In fact, the charges were summarily dismissed as soon as the FBI commenced an obstruction of justice against the Air Force and the judge advocates. (D-96,97,101) Brower then fabricated a reason for dropping the charges by saying that Gowan had now provided information about his business that was exculpatory. (D-99,100) Serious damage had already been done to Gowan's business and to his reputation. (D-87.138) The information that caused the charges was available from Gowan from the beginning; however, Brower had refused to request it or even accept it when it was offered by Gowan. Brower's written explanation for dropping the charges led to numerous other documents which paraphrased the Brower letter and conveyed the lies to Congress and Air Force officials.

(D-111,148,150) Steele did not approve of the KAFB Commanders decision to dismiss the charges, and took it on himself to reinvent the same charges by calling the Inspector General. This caused additional damage to Gowan by creating more false and damaging records. (D-104,166) It was only after Gowan filed this lawsuit that the Air Force began to provide his records, to amend the AFOSI report, and to agree to accept statements of disagreement. (D-147,177) The Air Force used the Board of Correction for Military Records to avoid compliance with the Privacy Act. They directed Gowan to the Board when other Air Force offices had failed to comply with the Act. The Board (AFBCMR) promptly "lost" Gowan's records and would never have answered his request, if not for the instant lawsuit. (D-183,184,185,187) The Air Force is to this day refusing to provide access in response to Gowan's request for his records and this is preventing him from amending or entering statements of disagreement.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's supervisory power. The testimony has described clear violations of the Privacy Act and the Courts have failed to hold in a manner that is consistent with the evidence and with the legal requirements of both the Privacy Act and the Constitution of the United States. Additionally, there is an ad hoc procedure employed in the Circuits concerning what constitutes a "record" under the Privacy Act, what constitutes a "system of records", as to what constitutes "disclosure", as to what constitutes "retrieval" of an individual's records, and proper "exemptions" of records. Some elements of this case make it a case of First Impression. No where in existing case law has there been such a challenge to governmental abuse of the Privacy Act that has been so clear and so thoroughly and completely documented.

The evidence is compelling and unequivocal that both the District Court and the Court of Appeals failed to adhere to any and all requirements of the Privacy Act. If we are to be a nation of laws that are respected we cannot allow such defilation to go uncorrected. Such acts offend the Constitution of the United States as it provides for individual privacy. If the ruling of the Tenth Circuit Court of Appeals is allowed to stand, it will eviscerate a cornerstone of American democracy.

The Privacy Act implements one of our most cherished fundamental rights. The Congressional intent for this law is clear. "Privacy is a personal and fundamental right protected by the Constitution of the United States." The stated Congressional intent is--to provide everyone with the right to discover what information is being collected on them by the government. It requires that access be granted to that information. It mandates that individuals be allowed to correct or amend information about them. It requires that "information cannot be used or made available for another purpose without his [the individuals] consent." It requires that the information be used "for a necessary and lawful purpose, [and] that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse..." In the case that Gowan has brought against the Air Force, the Air Force has failed in all of its obligations under the Law as stated by the Privacy Act of 1974. It has failed to comply with its most basic obligation—to collect information directly from Gowan first. It has created false records. It has covered up the truth by failing to provide access and thus defeating the amendment and statement of disagreement requirements of the Act. It has used the records for purposes other than the ones for which they were created. It has made unlawful disclosures of protected records. It continues to use the records for unlawful purposes. It has never made any attempt to assure accuracy of the records it is maintaining nor to provide the necessary safeguards required to prevent misuse. It

has never made any attempt to punish the individuals who willfully violated Gowan's privacy rights. Congress intended that damages which result from such violations, when willful and intentional, should be recovered by civil suit. The mean-spirited Air Force falsification of Gowan's records, the persecution of Gowan for performing his duty as an officer who witnessed and reported violations of Title VII and fraud, waste, and abuse; can be nothing but willful and intentional violations of the Privacy Act. If the decisions of the lower Courts are allowed to stand, the result shall be continued Air Force contempt for the Privacy Act and the protections it provides to all our citizens. Public Law 96-303, Code of Ethics for Government Service requires: "IX. Expose corruption wherever discovered." Gowan was required by law to make the corruption he witnessed known to the proper authorities, to which he has testified. He met his obligation to his Country and to the law. It is now the responsibility of the Court to provide him with relief from the injuries he has suffered in the performance of his duty. The Court of Appeals and the lower court both failed to find any violation of the Privacy Act and failed to provide any protection to Major Gowan rights under the law.

I. Whether the Court committed reversible error by failing to find that the "mean-spirited" attack on Major Gowan for his advocacy of civil rights was carried out through violations of the Privacy Act of 1974.

The Court committed reversible error in holding that Gowan failed to prove willful or intentional conduct on the part of the Air Force attorneys who prosecuted Gowan to prevent him from acting as a civil rights advocate and from disclosing fraud, waste and abuse. The actions the Air Force took against Gowan had no basis in military justice. To carry out their plot they intentionally created false records, untruthful investigations, and unfounded rumors to discredit Gowan's character, destroy the unblemished record of

his career, and ruin his business opportunities after retirement. The records that they created in the process were fabricated to create an imaginary "crime" to cover up their real intent and to give them the protection of the exemptions to the Privacy Act, enjoyed by all legitimate military justice criminal prosecutions. There never was a crime nor probable cause of a crime. Therefore, their claim of protection under 5 U.S.C. § 552a(j)(2) exemptions for "criminal" investigations and "criminal" reports is illegitimate and illegal. There was an investigation, but that investigation found no wrongdoing on the part of Gowan, and that investigation rightfully falls under 5 U.S.C. § 552a(k)(2) not (j)(2). 5 U.S.C. § 552a(k)(2) provides rights to the subject of the investigation. It states: "That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would other wise be eligible as a result of the maintenance of such material, such material shall be provided to such individual..." Gowan certainly had a right to have the material since he was being deprived of the right to an earned retirement and would have been deprived to his freedom if the Air Force had succeeded in their plot. The Air Force was ostensibly investigating Gowan's off-duty business activities, which had already been disclosed to the Air Force and approved by the Air Force, twice. Gowan also made a full disclosure to the FBI. Brower, the Staff Judge Advocate, KAFB, was named as a discriminating official by an employee that Gowan was representing. In any case, the proper agency to be investigating conflict of interest was the FBI. AFR 124-12/DoD Directive 5525.7 (Plaintiff's exhibit 17) describes a Memorandum of Understanding with the DoJ that told the Air Force to refer suspected cases of conflict of interest (18 U.S.C. 208) to the FBI for investigation and prosecution. The Air Force allegation to the OSI cited a violation of 18 U.S.C. 208. When the FBI was informed of the actions by Brower, they opened an obstruction of justice investigation against the Air Force and their attorneys. Brower immediately

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discovered a reason to dismiss the charges against Gowan.

Men and women in uniform are subject to military law and, as a consequence, are more vulnerable to loss of due process rights than any other segment of our society. While the military must be given enough freedom to perform it duties, it must be held accountable for conduct that is lawless. At the conclusion of the District Court hearing on this case, the Honorable Lorenzo F. Garcia, presiding, said:

> This lawsuit does not concern negligent, wrongful, or indeed intentional misconduct by the United States Air Force, and particularly Kehl and Steele. The tenacious and mean-spirited pursuit of the groundless allegations of wrong-doing irreparably tarnished Gowan's otherwise sterling reputation. Gowan, by virtually all accounts, was a consummate professional, dedicated Air Force officer, and a gifted scientist who devoted his time, talents and energy to further the interests of his country, and who sought, at every instance, to do the right thing. He complied with Air Force regulations, and sought to avoid even the appearance of impropriety. Like the biblical Job, Gowan was an honorable man who did all that was required of him, yet, he was rewarded for his efforts by charges that he violated his responsibilities as an Air Force officer and the regulations which he had sworn to uphold. Rather than retiring with pride, respect and admiration that were owed him, his retirement was marked with disgrace and person humiliation. Those responsible for the immoral treatment afforded Gowan are immune under the Feres Intra-Military Doctrine, Feres v. United States, 340 US 135, 146, 71 S.Ct. 153 (1950).

The Air Force was only able to engage in this "intentional misconduct", by violating the Privacy Act. If

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they had gone to Gowan for the information as the Act requires, in the first place, all issues would have been resolved. If they had not intentionally falsified the AFOSI report, all issues would have been resolved. If they had properly provided access when it was first requested, all issues would have been resolved. They had no desire to resolve any issues; they were simply bent on a cowardly attack, sanctioned by their authority as Judge Advocates. The lower Court committed reversible error when it concluded that the Privacy Act provides no relief. It is stated in the Privacy Act that the intent and purpose is to allow a "civil suit for any damages which occur as a result of the willful or intentional action which violates any individual's rights under this Act." The United States Air Force cannot give dispensation to its officers to act in an unlawful manner nor should it protect them when they do so. The Nuremberg Trials should be instructive in that regard.

II. Whether the Court committed reversible error by failing to find that the Air Force creation and maintenance of false records was a violation of the Privacy Act of 1974.

The most damaging and unfounded statement in the findings of the Court of Appeals is its statement that: "Although the court may award damages, attorney fees and costs upon finding that an agency intentionally and willfully failed to maintain records with such accuracy and completeness as to ensure fairness, ...the record on appeal does not demonstrate that Major Gowan raised this issue in the district court." This issue was raised repeatedly and consistently in the District Court. The first paragraph in the "General Nature of the Claim of the Parties", in the Pretrial Order addresses this issue. It is also addressed in the Brief in Chief of the appeal to the Court of Appeals.

The Appeals Court made a reversible error when it failed to properly consider the statement of the Plaintiff's contentions in the Pretrial Order. Gowan's Pretrial

Order makes a direct claim under "IV. Contested Issues of Fact" and states: 11. Whether Defendant intentionally failed to adequately maintain the Plaintiff's employment records in accordance with the Privacy Act. "The General Nature of the Claims," Plaintiff's Contentions states: "Plaintiff contends that Defendant, Department of the Air Force, created false records and thereafter failed to maintain accurate and complete records relating to his activities and employment with Defendant, and knowingly utilized such inaccurate and incomplete records to promote and prosecute court-martial charges against Gowan contrary to the Privacy Act. Plaintiff further contends that Defendant improperly utilized such false and inaccurate records, causing damage to Plaintiff." Again, under contested issues of law, Gowan contested: Whether Defendant's acts are in violation of the Privacy Act, 5 U.S.C. Section 552a, et seq." All this is contained in the Pretrial Order.

The Court erred in holding that Gowan was not harmed by the OSI report. The Air Force violated the first requirement of the Privacy Act by not collecting objective information directly from Gowan. The Air Force admitted to falsifying the OSI report by omitting exculpatory information. Gowan was compelled to file suit to obtain an amendment to the OSI report. The Air Force removed its false statement asserting that Gowan's witnesses were interviewed but had no information. The Air Force did not determine which version of events was correct, but filed its report with its own version of events. See, Doe v. United States (1986) 251 App DC 54,781 F2d 907 reg gr, vacated on other grounds, en banc 252 App DC 41, 786 F2d 1203, on reh 261 App DC 206, 821 F2d 694. (Duty to amend by agency keeping copy of subject's rebuttal together with allegedly false record; although the Act does not require perfect accuracy, agency has a duty to determine which version of events is accurate, and is not free to include its agent's report in files without concluding that it is accurate.) In Gowan's rebuttal, he proved that falsifying the OSI report by omitting exculpatory witnesses, caused him harm because the

intentional omission led to an opportunity for judge advocate attorneys Brower, Kehl, Gampel and Ruppert, to file false criminal charges against Gowan, which were eventually dismissed when the "exculpatory" information was considered by Brower. However, Gowan had already been damaged in his reputation, character, and business opportunities. The Air Force, in falsifying Gowan's report, had no grounds for believing it to be lawful and it was done in flagrant disregard of Gowan's rights under the Privacy Act; and evidenced reckless conduct with knowledge of violation of law Wisdom v. Dept of Hous. & Urban Dev., 713 F2d at 425 (8th Cir. 1983.); Albright v. United States, citing Parks, 732 F2d 181,189; (DC Cir. 1984.) Moskiewicz v. US Dept. of Agriculture, 791 F2d 561, 564 (7th Cir.1986); Parks v. IRS, 618 F2d 677 (10th Cir. 1980). The same is true for the Nameth and Alison letters which were sent to Congress replete with false statements. The Air Force only admitted to two of the many false statementr in the Nameth letter and that, only after many attempts by Gowan to correct the record. No attempt was made to determine the truthfulness of the statements in that letter or any of the other Air Force letters Gowan has brought to the attention of the Court.

Both the Trial Court and the Court of Appeals erred when they failed to hold that the Air Force failed to maintain Gowan's records in accordance with the requirements of the Privacy Act.

III. Whether the Court committed reversible error by failing to find that the Air Force failed to collect information to the greatest extent practicable directly from Major Gowan and in so doing violated the Privacy Act of 1974.

The Court of Appeals erred in holding that Gowan failed to raise the claim that the Air Force violated the mandate of the Act to obtain information directly from him. Claim for failure to adequately maintain records gives rise to cause of damages. Wren v. Harris (CA10 NM) 675 F2d 1144. 5 U.S.C. § 552a(a)(3) provides that

the term "maintain" includes maintain, collect, use, and disseminate. See argument in Question II showing that the claim of failure to maintain is in the Pretrial Order and throughout Gowan's case. Contrary to the holding of the Court Gowan did properly raise the issue of the Air Force duty to obtain information from him and consequently the Court erred by failing to consider Gowan's claim.

Not only did the Pretrial Order clearly raised the issue with the lower court, it was also considered by the lower court as is reflected in the findings of fact (D-71). The rule regarding the effect of a pretrial order was set forth in, Trujillo v. Uniroyal Corp., 608 F2d 815 (10th Cir.1979). ("A definitive pretrial order reflecting the agreement of the parties, having been entered into after full discovery, must, of course, control the subsequent course of the action. F.R.Civ.P. 16(6).")

The Air Force did not comply with 5 U.S.C. § 552a(e)(2) to obtain the information it sought "directly from the subject individual" Instead the Air Force immediately launched a criminal attack against Gowan which produced numerous false and damaging records concerning him. The evidence shows that the information was available from Gowan and that it would have averted the investigations that created the false records. If the AFOSI had told the truth and created a complete and accurate record the document would have prevented any further inquiry. Instead the AFOSI lied in their report by declaring that Gowan's witnesses had been interviewed but had no pertinent information. In fact, the witnesses testified to having exculpatory information at trial, which, would have prevented the court martial charges and the ensuing damages. Waters v. Thornburgh, 888 F2d 870, 873 (DC Cir 1989). (The Court ruled that the Justice Department violated section (e)(2) when it contacted the Pennsylvania State Bar to determine if an employee had actually taken the bar exam, but did not first contact the individual directly in an effort to get definite proof from him. The Court specifically rejected

the argument that doubts about plaintiff's credibility justified seeking information first from a third party, noting that "in the context of an investigation that is seeking objective, unalterable information, reasonable questions about a subject's credibility cannot relieve an agency from its responsibility to collect that information first from the subject.")

The Court of Appeals sites the Privacy Act at 5 U.S.C. § 552a(e)(2) saying: "Each agency that maintains a system of records shall...collect information to the greatest extent practicable directly from the subject when the information may result in adverse determinations about an individual's right, benefits, and privileges under Federal programs. "The district court may award damages, attorney fees, and costs for an intentional and willful violation of Section 552 (e)(2) that results in an adverse effect on the plaintiff." The Court of Appeals held: That Gowan did not include this issue in the pretrial report, and so it was not part of the case before the district court." The definition at 5 U.S.C. § 552a(a)(3) and the Pretrial Order show the error of that statement. The Appeals Court erred as a matter of law. In fact, the Plaintiff's Brief in Chief again raises the issue at 5. The record shows that all the information collected about Gowan was derogatory and had an adverse effect on Gowan's career. The Trial Judge was compelled to note that Gowan was damaged by acts of the Defendant Air Force. Judge Garcia states: "The tenacious and mean-spirited pursuit of groundless allegations of wrong-doing irreparably tarnished Gowan's otherwise sterling reputation." The "groundless allegations" against Gowan were dropped when the Air Force found their thinly veiled reprisal had made them the subject of an obstruction of justice investigation by the FBI. The Judge Advocate officers then went to Gowan and obtained the information. They quickly claimed it was exculpatory. Had this been done when it was required by the Privacy Act, all of the subsequent problems and this litigation would have not been necessary. The Appeals Court erred when it failed to

find the Air Force committed a willful and intentional violation the Privacy Act by refusing to collect information, directly from Gowan in the first place.

IV. Whether the Court committed reversible error by failing to find that the Air Force failed to grant access, amendment, and the right to file a statement of disagreement to Major Gowan and in so doing violated the Privacy Act of 1974.

The Court of Appeals erred in holding that the "Ethics" file, containing personal information about Gowan, and used to initiate a number of adverse investigations, did not constitute a privacy record pertaining to Gowan. This holding is contrary to common law. In Chapman v. National Aeronautics and Space Administration. 682 F2d. 526 (5th Cir., 1982), the Fifth Circuit concluded that a supervisor's purely private notes related to the qualifications of an individual to maintain employment were subject to all aspects of the Privacy Act once reliance had been placed on the notes by the agency to consider Chapman's discharge:

> It is uncontroverted that the subject notes played a part in Chapman's discharge. We make neither a qualitative nor quantitative analysis of this use, confining ourselves to the observation that the notes in fact were involved in the decision to termination Chapman's employment...When Phinney tendered his notes to Hall for use by NASA in proceedings looking to the discharge of Chapman, the private aspects of the notes evanesced and they became subject to the requirements of the Privacy Act. Chapman, at 528-529.

The Fifth Circuit concludes by noting that when private notes bear negatively on a worker's employment status or situation, such notes must be handled in a manner consistent with both the letter and the spirit of the Act. Chapman, at 529. The Eleventh Circuit in

Boyd v. Secretary of the Navy, 709, F2d. 684 (11th Cir., 1983) cert. Den'd, 104 S.Crt. 709, 464 US 1043, 79 L.Ed.2d. 173, reiterates the rule. A supervisor's private notes on an employee "must be kept private, and cannot be used in decision affecting the employment statue of the employee." Boyd, at 689. In the instant case, the record is replete with references to use by the Air Force of Kehl's "Ethics" file in determinations relating to Gowan's employment rights and privileges. The Air Force considered off-duty employment a privilege, subject to Air Force approval or denial. The "Ethics" file was a product of, and was utilized to determine the propriety of Gowan's off-duty employment. Subsequently, the "Ethics" file was used to determine cause to prefer criminal charges by the Air Force against Gowan. The "Ethics" file was used by Brower to respond to the MAC Judge Advocate inquiry about Gowan. Finally, the "Ethics" file was used by Elder to oppose Gowan in EEO and civil rights proceedings at KAFB. Given the official use of the file in at least three instances where Gowan's rights, benefits, and privileges were determined, the Air Force had an obligation to maintain the "Ethics" file in a system of records. Further, the "Ethics" dossier was widely used and disseminated from October, 1987, to January, 1994, before it was finally released to Gowan. The failure to identify and release this file to Gowan for more than six years is a willful and intentional violation of the Act. It was only disclosed to Gowan just before the trial in the lower court in 1994. These acts alone entitle Gowan to the award of damages, costs, and attorney's fees. Cuneo v. Rumsfeld, 553 F.2d 1360 (DC Cir. 1977).

The Court of Appeals erred by failing to find that Gowan was denied access to documents that he was properly entitled to under the Privacy Act. Without access there was no possibility of amendment. Even when the information was eventually provided as a result of the law suit, amendments and statements of disagreement were denied. The Air Force was required to timely respond to Gowan's request for access,

amendment and statement of disagreement requests and describe procedures available for the review and challenge of a refusal. 5 U.S.C. § 552a(d)(2)(A)and(B). See Baker v. Dept of Navy, 814 F2d at 1384, 1385. Release of the "Ethics" file 4 years after it should have been properly released is a gross violation of the Privacy Act time requirements. Kehl claimed that there was other information in this file that did not concern Gowan The Court relies on the self-serving statements of a former officer, who was allegedly forced from the service for falsifying official records, to resolve the issue. They could have just a easily referred to the testimony of Ruppert, the Pentagon Judge Advocate who testified about the "Ethics File" at P109 of his testimony. He said that all the documents in that file concerned Gowan and that Kehl told him that he had compiled them on Gowan. (Appendix C, a.)

The Appeals Court made a reversible error in determining that the documents contained in the "Ethics" file did not constitute a system of records, as defined by the Privacy Act. " The US Court of Appeals for the DC Cir has recently relied on retrieval in practice and not retrieval capability as being essential in order for a system or records to exist. See Henke, 83 F.3d at 1460 n.12. The records in the "Ethics" File, the OSI file and the IG file were documents concerning Gowan alone. In the instant case, the Appeals Court said: "We recognize the possibility that an unscrupulous person may try to mask a record properly subject to the Privacy Act by labeling it with a generic code word that effectively acts as a 'personal identifier.'" The evidence is clearly there that shows this possibility to be reality in this case. The Appeal Court chose to ignore it.

Gowan has not abandoned his claims regarding any of the Air Force failures to properly amend or to properly attach a statement of disagreement to documents that the Air Force refuses to properly amend. The Court of Appeals states that: "In its brief the Air Force submits that it is willing to and will attach statements of

disagreement to the Nameth and Brower letters. In light of this representation, we assume that the Air Force has or will immediately voluntarily comply with the Privacy Act and attach Major Gowan's statements of disagreement to the Nameth and Brower letters." With that statement the Court disposes of the entire issue. After years of failure to correct the numerous false statements and their failure to attach the mandatory statement disagreement the defendant is now not only offering to add the statements of disagreements, but threatening to do it for Gowan, if he does not submit them immediately. There is no Privacy Act provision that would allow the agency to insert a statement of disagreement into a person's records, against his will. This act shows the Air Force's callous disregard for the law that is prevalent throughout this case.

The Court of Appeals ruled that: "Before 1990, however, the Air Force did not permit amendment or the inclusion of statements of disagreement when the objectionable material was an opinion or subjective belief." The implementing Air Force Regulation was in direct conflict with the law as stated in the Privacy Act of 1974. The Privacy Act makes no such provision for denial of a statement of disagreement. The Court of Appeals held that: ..."The Privacy Act clearly grants individuals the right to seek agency review of a denial of a request to amend, to file a statement of disagreement, and to seek judicial review of the agency's determination. See 5 U.S.C. § 552a(d)(3), (g)(1)(A). Therefore, any Air Force policy that provides to the contrary would be invalid under the Act." The testimony of the Air Force Privacy Act Manager, Anne Rollins is instructive on this matter. She testified that Gowan was absolutely right concerning statements of disagreements and that the Air Force changed its policy to make it consistent with the Act. (Appendix C, b.)

The Air Force claim that Gowan had no right to amend because the requested amendments were subjective and also their refusal to allow a statement of

disagreement are clear violations of the Privacy Act. Any regulation to the contrary is invalid as stated by the Appeals Court. The Privacy Act did not change in 1990. Air Force attempted to bring regulations into compliance with the law as a result of this litigation during 1990. The Appeals Court clearly committed reversible error in not finding the Air Force denials to be a violation of the Privacy Act.

The Court erred in holding that the OSI report was not subject to amendment because it was claimed to be exempt as a law enforcement record. The OSI's function is not that of law enforcement merely because it conducts "investigations." ("Records maintained in Central Records System of FBI are not exempt from demands of Privacy Act since record simply by virtue of fact that the function of the FBI is law enforcement, rather characterization of records at issue turns upon type investigation involved, further if Congress had wanted to exempt entire filing system of FBI from Privacy Act it could have done so.") Vymetalik v. FBI, (1986) 251 App DC 402, 785 F2d 1090. Further, there is ambiguity in the language of the Privacy Act at 5 U.S.C. § 552a(j)(2), exempting "law enforcement agencies," whose principal function is law enforcement and the Court must determine if "the statutory scheme is coherent and consistent." United States v. Ron Pair Enterprises, Inc., 489 U.S. 253, 240 (1989). The plainness or ambiguity of the statutory language is determined by reference to the language itself, the specific context of the statute in which the language is used, and the broader context of the statute as a whole." Robinson v. Shell Oil, Supreme Court Case No. 95-1376, decided February 18, 1997. The Air Force in fact amended the OSI report to delete false information because the investigative report is not exempt from the demands of the Privacy Act, even if the Court held to the contrary. There is ambiguity in the Act's definition of law enforcement and the Supreme Court must resolve it. ("We are left to resolve that ambiguity.") Robinson at 8. The OSI and Inspector General reports must be released to the target of the investigation, as mandated by 5 U.S.C. § 552a(k)(2),

albeit minus confidential material. Hernandez v. Alexander, 671 F2d 402 (10th Cir. 1982). The Air Force has never claimed a confidential source was involved.

V. Whether the Court committed reversible error by failing to find that the Air Force did not make a reasonable effort to assure that records were properly protected and that they were accurate, relevant and complete before they were used or disseminated and in so doing violated the Privacy Act of 1974.

The Trial Court and the Appeals Court erred by failing to conclude that the Air Force willfully and intentionally disclosed the charge sheet and information derived from the charge sheet to persons not authorized to receive it, in violation of the Privacy Act, thus causing Gowan injury. It is not disputed that the charge sheet was in a system of records (Conclusion of Law 46). The Federal Register at F111 AF JA/B instructs that offenses charged (the charge sheet) are: "accessed by custodian of the record system and person(s) who are properly screened and cleared for need-to-know. Records are stored in vaults and locked cabinets or rooms. Records are protected by guards, and controlled by personnel screening and by visitor registers. Exemptions claimed for the system: None." The Court of Appeals held correctly: "We disagree with the district court's conclusion that a matter of public record is not subject to the provisions of 5 U.S.C. 552a(b)." The entire compilation of records maintained on Gowan in the attempt to discredit and punish him for acting as a civil rights advocate never rose past the level of allegations. No Article 32 hearing was ever conducted to determine whether or not evidence was sufficient to proceed to a courts martial. All of the false charges were unconditionally dropped by the Air Force. This did not stop the Air Force Judge Advocates from disclosing false and misleading information to the Wyoming Bar, the Texas Bar, Gowan's co-worker in the Air Force

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Laboratory, to the EEOC, or to Senators Wallop, Nunn, and Bingaman in direct violation of the 5 U.S.C. § 552a(b). The Air Force had a responsibility to maintain truthful and accurate records 5 U.S.C. § 552a(5) and (6). See Doe v. United States (1986) 251 App DC 54,781 F2d 907, reg gr, vacated on other grounds, en banc 252 App DC 41, 786 F2d 1203, on reh 261 App DC 206, 821 F2d 694. (Duty to amend by agency keeping copy of subject's rebuttal together with allegedly false record; although act does not require perfect accuracy, agency has duty to determine which version of events is accurate, and is not free to include its agent's report in files without concluding that it is accurate.) It was the responsibility of the Air Force to: 5 U.S.C. § 552a(6) prior to disseminating any record about an individual to any person other that an agency, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes. Transmitting records which they knew were false is a violation of the Act. Refusing to let Gowan correct them under his Privacy Act rights left the false information in the record for years. The Trial Court failed to consider the intentional and willful intent of Kehl, et al., in his disclosure of the charges to Elder and others, relying instead on a non-existent "public records" exception. The Court of Appeals was not convinced by the Trial Court's argument when it cited US Dep't of Justice v. Reporters Comm. For Freedom of the Press, 489 US 749, 762-64 (1989). The Appeals Court held that: "We adopt the Third Circuits reasoning and hold that an agency may not defend a release of Privacy Act information simply by stating that the information is a matter of public record." Both Courts erred by failing to protect or act to preserve Gowan's privacy rights and find a violation of 5 U.S.C. § 552a(b). There were findings that disclosures occurred by both Amor and Elder but the Court erroneously held that there had been no violation of the Privacy Act. A disclosure under 5 U.S.C. § 552a(b) does not need to be intentional or willful to be a violation. The Appeals Court erred by requiring that the disclosure be willful or intentional. The Appeals Court also erred

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by failing to find that the information disclosed to the Senators was known to be false and a violation of the Privacy Act at 5 U.S.C. § 552a(e)(6).

The AFOSI report of investigation found no wrongdoing by Gowan but was intentionally falsified. The report stated that witnesses such as MacMullen and Hoyt had been interviewed when they had not. The Air Force Board of Corrections, years after a request for correction by Gowan, and just prior to the District Court hearing, acknowledged that several witnesses had not been interviewed. They did nothing else to correct the record. The Burton testimony was that they had lost and loaned (to the IG) the record and had reconstructed it for their review of Gowan's request for correction. Burton, from the Board of Correction, testified that the JAG advised them on their ruling. Judge Garcia observed that Gowan's complaint was against the JAG and said that that was like "asking the fox to guard the hen house." Burton agreed. (Appendix C, c.)

Hoyt and MacMullen provided extensive testimony to the District Court that would have prevented the Air Force from forming the charge specifications against Gowan. The testimony of Ruppert, a Pentagon Judge Advocate, brought into the case by Brower, clearly shows that Privacy Act protected records are routinely falsified. It also shows that the reason for the falsification is to prevent a truthful release to a person requesting access. (Appendix C, d.)

The lower court and the Appeals Court committed reversible error by not holding that the Board of Correction process was used by the Air Force to subvert the intent of the Privacy Act.

The lower court erred as did the Appeals Court by failing to acknowledge and hold that the "cooking-the-books" observation of Judge Lorenzo Garcia (Appendix C, d.) constitutes a serious violation of the Privacy Act.

VI. Whether the Court committed reversible error by failing to find that Major Gowan's First and Fourth Amendment Constitutional rights have been violated by the Air Force collection and maintenance of record which show how he exercises those rights and in so doing violated the Privacy Act.

The Court erred in failing to find that Gowan's Constitutional rights under the First and Fourth Amendments were not violated. The Privacy Act at 5 U.S.C. § 552a (e)(7) provides that each agency that maintains a system of records "maintain no record describing how an individual exercises rights guaranteed by the First Amendment..." Gowan proved that a file was kept illegally by Air Force attorneys Elder and Brower and used to discredit Gowan in the performance of his protected activities. Some testimony from the District Court hearing is so damaging to the Air Force that it must be directly reviewed to understand the magnitude of the contempt for the Privacy Act displayed by the Air Force. The testimony of George P. Elder, an attorney who has been opposing Major Gowan advocacy for civil rights for over ten years, is such testimony. The questions are posed by the Air Force counsel. (Appendix C, e.) This is specifically forbidden by the Privacy Act at 5 U.S.C. § 552a(e)(7): "maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about who the record is maintained..." Both Courts committed reversible error in not finding the Air Force violated the Privacy Act at 5 U.S.C. § 552a(e)(7).

The Court of Appeals erred in not considering Gowan's First Amendment claims and ruling that Air Force did not violate subsection (e)(7). Albrigth v. United States, 732 F.2d at 187 (DC, 1984). Subsection (e)(7) provides that an agency must "maintain no records describing how any individual exercises rights guaranteed by the First Amendment." 5 U.S.C. § 552a(e)(7) applies to a "record"

even if it is not incorporated in a "system of records." Clarkson v. IRS, 678 F2d 1368, 1374-77 (11th Cir.1982); Albrigth at 918-20. Under 5 U.S.C. § 552a(e)(7) general monitoring of associations is illegal unless pertinent to and within scope of authorized law enforcement activity. Irons v. Bell (1979, CA 1 Mass) 596 F2d 468. Brower and Elder have compiled information about LIBERTAD, and in particular Gowan and Hernandez, to illegally monitor their association with government employees.

In this case, the Staff Judge Advocate, Lt Col Charles L. Brower left the entire record of the attempted courts martial for Elder so that he could use it to oppose Gowan on EEO matters. Elder has had the records for 8 years and continues to use the illegally collected records to "tarnish" Gowan's reputation with each new commander, judge advocate, and US attorney. This file has become an illegal record, not authorized by the Federal Register, which is used to show how Gowan exercises his First Amendment rights. Staff attorney Elder admitted in trial testimony to taking Gowan's court's martial records from staff judge advocate Brower and keeping them for the purpose of disclosing to anyone how Gowan exercised First amendment rights. Further, Elder improperly maintained said records and caused harm to Gowan. (A record may be improperly "maintained" if its is improperly collected, independent of its subsequent use or dissemination.) Albrigth v. United States, 732 F.2d at 919. The Act does not define disclosure, leaving the meaning of that term to case law development. Krowitz v. Dept. of Agriculture, US Forest Service, 641 F Supp 1536, 1542 (WD Mich 1986). Generally courts have read the term in connection with the Act's purpose "to preclude a system of records from serving as the source of personal information about a person that is then disclosed without the person's consent. (emphasis in the original) Olberding v. Dept of Defense, 564 F Supp 907, 913 (SD Iowa 1982), aff'd, 709 F2d 621 (8th Cir 1983). Oral disclosures from memory are included within the disclosure restriction. Fitzpatrick v. IRS, 1 GDS para. 80.232 (ND Ga. 1980), aff'd in part,

vacated and remanded in part, 665 F2d 327 (11th Cir 1982). Elder's use of Gowan's records was not "routine use." A "routine use" is defined in subsection (a)(7) to mean "with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected." Swenson v. US Postal Service, 890 F2d 1075 (9th Cir 1989). Subsection (e)(4)(D) requires that each "routine use" be published in the Federal Register, at least annually, for each system of records. Thus, "the scope of routine uses is confined by the published definitions." Doe v. Naval Air Station, Pensacola Fla., 768 F2d 1229, 1231 (11th Cir 1985). Covert v Herrington, 876 F2d 751 (9th Cir 1989. (The Court found a disclosure improper because the agency had not provided an appropriate routine use listing on the form used to collect the data.)

According to the Analysis of Compromise Amendments, the "routine use" exception was included to permit the nonconsensual intra or inter agency transfer of information where such transfer was for "housekeeping" or was "necessarily frequent," but also was intended "to discourage the unnecessary exchange of information to another person or to agencies who may not be as sensitive to the collection agency's reasons for using and interpreting the material." Source Book at 850. (The legislative history of the Act is exhaustively collected in the Legislature History of the Privacy Act of 1974, S. 3418 (Pub. L. 93-579): Source Book on Privacy, Joint Committee Print of Senate and House Committees on Government Operations, 94th Cong., 2d Sess., September 1976 (hereafter "Source Book").

VII. Whether the Court committed reversible error by failing to find that Major Gowan substantially prevailed in the action brought against the Air Force and whether financial and emotionally damaged was caused by Air Force violations of the Privacy Act of 1974.

The Court erred in holding that Gowan was not entitled to attorney fees and costs because he did not substantially prevail and had not proven willful or intentional conduct in violation of the Act. In deciding whether a party has substantially prevailed, a court should consider whether the "prosecution of the action could reasonably be regarded as necessary to obtain the information" and whether "the action had a substantial causative effect on the delivery of the information." Lovell v. Alderete, 630 F2d 428, 432 (5th Cir. 1980). If a party is found to have substantially prevailed in the litigation, then the court must exercise its discretion in determining whether an award is justified." Clarkson v. IRS, 678 F2d 1368, at 1371 (11th Cir 1982).

The Court erred in failing to find evidence of willful or intentional conduct by Air Force attorneys. The trial court and the 10th Circuit of Appeals erroneously denied Gowan's Privacy claim for damages. The Air Force conduct clearly met the willful or intentional standard adopted by the Tenth Circuit Court of Appeals. See Andrews v. Veterans Admin. Of U.S., 838 F.2d 418, 425 (10thCir. 1988) (We are persuaded by the District Court of Columbia's Circuit's definition of willful or intentional that contemplates action "so patently egregious and unlawful 'that anyone undertaking the conduct should have known it 'unlawful,'" Laningham v. United States Navy, 813 F.2d 1236 at 1242). The conduct of the Air Force attorneys, Brower, Gampel, Khel, and Ruppert, who engaged in initiating the bogus OSI investigation and subsequent bogus investigations, and preferral of bogus courts martial charges against Gowan, was willful or intentional. The Air Force attorneys knew or should have known that the Privacy Act mandates that information must be obtained from Gowan to the extent possible. They failed and refused to do so. They knew that if they went to Gowan initially to get his exculpatory information, they would have no pretext to investigate Gowan and create a false record against him. Only after these attorneys gathered false and damaging records about Gowan and used them to prefer courts martial charges against him,

did Brower seek the exculpatory business contract and public domain, journal articles from Gowan which proved that Gowan had done nothing wrong. The exculpatory information was always available to Kehl, even before he asked for the OSI investigation. It was also attached to the final OSI report. The OSI report was intentionally falsified by excluding Gowan's witnesses, but reporting that they were interviewed but lacked exculpatory knowledge. The Air Force attorneys were motivated to create false and damaging records about Gowan to discredit him because he was engaged in civil rights activity in the Air Force and was cooperating with the FBI in disclosing Air Force fraud, waste and abuse. But the damage was already done. Gowan's character and reputation were blemished by the false and damaging reports fabricated by Air Force attorneys. His business associates withdrew their economic support and Gowan's private business lost approximately $13.3 million in business opportunities as a result of the egregious conduct of the Air Force attorneys, contrary to Privacy Act. Gowan's discharge from the Air Force was delayed and prevented his expertise from being available to work in the partnership. But the damage did not end there. After the baseless court's martial charges were dismissed, the identical information alleging criminal violations by Gowan was released by Air Force attorneys to top level Air Force officials and Congressional Offices to further damage, discredit, and embarrass Gowan. His requests to the Air Force to expunge the false information or to attach his statements of disagreements were ignored. The OSI report took about 4.5 years to be amended, but was done only as a result of Gowan's Privacy Act lawsuit. Thus, the 10th Circuit Court of Appeals erred as a matter of law in denying Gowan's claims for damages for intentional violation of his privacy rights granted to him by the Privacy Act and the Fourth Amendment to the US Constitution.

The Court of Appeals erred by not holding that Gowan substantially prevailed in this litigation. Many of the documents released by the Air Force were released

after and because of the filing of this litigation, including several hundred documents released 3 Oct 1996 by the Air Force General Counsel relating to an Inspector General investigation. The records supplied were a partial release of documents first requested on 29 Jan 90. Two amendments to documents, the AFOSI report and an Air Force letter to Congress, were also made in response to the filing of this litigation. The AFOSI document was changed to show that witnesses who were said to have been interviewed were not interviewed. The letter to Congress from Col Joseph L. Nameth, Office of Legislative Liaison, was amended to show that there was never "a prima facie case of fraud" against Gowan and that an Article 32 hearing was never held. The week prior to the District Court hearing the Air Force finally released the "Ethics" file to Gowan. The information in that file was first requested on 19 Oct 88. As can be seen from the testimony of Air Force Privacy Act Manager, Rollins, these records were required to be released at the time they were requested. A statement of disagreement was also added to the Alison letter to Congress. (The Air Force failed to even respond to Gowan's request for amendment, dated 24 Aug 89, until 30 Jul 91.) The Air Force made and effort to reconstruct Gowan's request for records correction to the Air Force Board of Correction for Military Records and made a ruling in response to this litigation.

According to Air Force testimony, the AFOSI report was amended 4.5 years after the request by Gowan and only because of the litigation in the District Court. Burton's, AFBCMR, relevant testimony said that 4 names were deleted from the list of those interviewed, including Hoyt and M[a]cMullen. He claimed that the file was loaned to the IG, inexplicably, and forgotten for 4.5 years. He testified that his boss found about the litigation and wanted him to get the AFBCMR to "make a ruling before the Court did." (Appendix C, f.) Besides showing that the AFOSI report is subject under the Privacy Act, Gowan showed that the AFOSI report is not a law enforcement record. Law enforcement records

cannot be corrected by the AFBCMR. Gowan also showed that false statements in the report were deleted 4.5 years following his request. The damage to Gowan's reputation and to his business had already occurred and arguably could have been prevented had the AFOSI report properly been amended within the 30 day time requirement of the Privacy Act. If the report had been amended, further investigations by the Judge Advocates would not have been possible. Those secondary investigations led to the courts martial charges and cancellation of Gowan's retirement date. These actions caused Gowan's business partners to withdraw from the partnership. According to the uncontroverted trial testimony of MacMullen, an officer in the SM Stoller Corporation, and Rondeau led to business losses of some $13.3 million. District Court Finding of Fact No 87 states exactly: "The delay in Gowan's retirement was viewed as the last straw for Stoller [Corp]. The OSI investigation had interfered with and delayed the marketing plans. Now, with the delay in Gowan's retirement, and indeed, prospect of a court-martial, Stoller pulled funding for the development and marketing of Conspectum A/S products [Gowan's marketable products] in February 1988. Thus, Gowan's economic prospects were materially and adversely affected."(Quotation from the Honorable Lorenzo Garcia.)

It is also shown from the testimony of Rollins that Gowan's lawsuit cause the Air Force to change its regulation to provide for the mandatory inclusion of a statement of disagreement to a record. This change not only benefited Gowan, it benefited the entire Air Force. Gowan should be able to recover damages, costs and attorney fees for this litigation.

Claim for failure to adequately maintain records gives rise to cause of damages. Wren v. Harris (CA10 NM) 675 F2d 1144. The AFOSI lied in their report by declaring that Gowan's witnesses were interviewed but had no pertinent information. In fact, the witnesses testified to exculpatory information at trial, which, had it

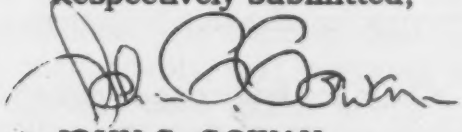
been included, would have prevented the court martial charges and the ensuing damages.

The compilation and dissemination of false information used against Gowan to prefer court martial charges and conduct investigations into his private business, damaged Gowan's reputation and his business opportunities and exposed him to ridicule from his commanders and the Congressional offices. As it was stated by the District Court trial judge: "Rather than retiring with pride, respect and admiration that were owed him, his retirement was marked with disgrace and personal humiliation."

Conclusion

For the reasons stated, the petition for a writ of certiorari should be granted. The numerous violations of the Privacy Act which harmed Gowan resulted from the Air Force attorney's willful and intentional refusal to obtain objective, exculpatory information directly from him, 5 U.S.C. § 552a(e)(2). If the motives of the Air Force attorneys were reasonable and objective and their intention was protect and promote the best interest of the Air Force, they would have simply asked Gowan for the two or three documents that they eventually got from him and never opened a case. Instead, they falsified records and then prevented Gowan from gaining access to them while they destroyed his career by violating every paragraph and every intent of the Privacy Act.

Respectively submitted,



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Appendix A -- Opinion of the United States Court of Appeals, Tenth Circuit, Dated 17 July 1998

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JOHN G. GOWAN,
Plaintiff-Appellant,
v.

No. 96-2134

UNITED STATES DEPARTMENT OF THE AIR FORCE,
Defendant-Appellee.

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. CIV 90-94 LFG)

E. Justin Pennington, Law Offices of E. Justin Pennington, Albuquerque, New Mexico, for Plaintiff-Appellant.

Maria Simon, Department of Justice, Washington, D.C. (Leonard Schaitman, Department of Justice, with her on the briefs), for Defendant-Appellee.

Before **EBEL**, Circuit Judge, **McWILLIAMS**, Senior Circuit Judge, and **HENRY**, Circuit Judge.

EBEL, Circuit Judge.

Retired Air Force Major John Gowan appeals the district court's judgment against him in this Privacy Act suit. We affirm.

BACKGROUND

Major John Gowan ("Major Gowan") was an Air Force officer whose area of expertise was high-energy laser optical materials and technology. One of his duties was to keep current on technological improvements that may have military value. In 1982, Major Gowan reported to the Air Force a breakthrough improvement in the detection

of structural flaws in materials - a method known as electronic speckle pattern interferometry ("ESPI") - which enabled the scanning of a component for defects without having to destroy the test subject. Major Gowan, however, was unable to interest the Air Force in evaluating ESPI for possible future use.

In 1986, while stationed at Kirtland Air Force Base in New Mexico, Major Gowan requested the privilege of off-duty employment with Applied Optical Systems, Inc. ("AOS"), a New Mexico corporation formed to research and market optical-related technologies, including ESPI. His request was approved by Major Randall Kehl ("Major Kehl"), Deputy Staff Judge Advocate at the Kirtland Air Force Base legal office. Later in the year, following a transfer to a different department, Major Gowan made a second request for off-duty employment with AOS. This request was approved by Major Kehl and by Major Gowan's squadron commander, Lt. Colonel Richard Steele ("Lt. Colonel Steele").

Through a subsidiary AOS marketed the RETRA 1000, a device that employs ESPI technology. Eventually the Air Force expressed interest in purchasing the RETRA 1000. Major Gowan was concerned about possible conflicts of interest. At Major Kehl's suggestion, Major Gowan disclaimed any direct or indirect financial benefit accruing from the Air Force's purchase of the RETRA 1000 from AOS.

Major Kehl still felt there might be a potential ethics problem. In the summer of 1987, he instigated a Kirtland Air Force Base Office of Special Investigations ("Kirtland OSI") inquiry of Major Gowan. The Kirtland OSI investigated Major Gowan's connections with AOS, but its report indicated no violations of law or regulations. Major Kehl, however, believed additional inquiry was necessary. He kept personal notes and legal research in a file marked "Ethics" in his desk drawer. The file did not distinguish anyone by name or other personal identifier. He also asked military attorney Major Mark Ruppert ("Major Ruppert") to investigate Major Gowan. Major Ruppert reviewed Major Kehl's Ethics file and the Kirtland OSI report, investigated AOS and ESPI technology, and, with the assistance of military attorney William Gampel ("Gampel"), interviewed Major Gowan's business partner Daniel Rondeau, also a member of the Air Force. He did not interview Major Gowan.

Major Ruppert found reason to believe Major Gowan had violated Air Force regulations regarding standards of conduct and recommended that charges be preferred against him. Gampel set up an attorney working file, kept neither by Major Gowan's name nor his social security number, with the papers collected by Majors Kehl and Ruppert. Lt. Colonel Steele signed the preferral of charges in January, 1988.

Major Gowan had been scheduled to retire from the Air Force on February 29, 1988, but the legal proceedings delayed his retirement. As a result of the delay, the corporation which had funded AOS's products pulled out of the agreement it had concluded with AOS. In addition, the charges became a topic of conversation at Kirtland Air Force Base. Colonel John P. Amor ("Colonel Amor"), Major Gowan's commanding officer, disclosed the preferral of charges against Major Gowan to certain of his staff, as well as possibly other Air Force personnel, during a telephone conference.

Knowledge of the charges also spread further than among Air Force personnel. At Kirtland, Major Gowan had befriended Dr. Thomas Hill, who was involved in litigation against the Air Force. Major Gowan became involved with Hill's case. Just before charges were preferred against him, Major Gowan complained to the Wyoming Bar that David Hickman ("Hickman"), one of the Air Force's attorneys in the Hill case, had tampered with a signature on a deposition. As part of the response to Major Gowan's complaint against Hickman, the Air Force's second attorney, George Patrick Elder ("Elder"), provided a copy of Major Gowan's charge sheet to the Wyoming Bar to provide context in rebutting Major Gowan's charges. Major Gowan, not knowing that Elder had released the charge sheet, also informed the bar of the charges against him.

After Major Gowan's civilian counsel pointed out that Major Gowan had not received improper payments from AOS and that ESPI technology had been publicly available for over a decade, Lt. Colonel Brower and Gampel recommended withdrawing the charges. Major Kehl and Lt. Colonel Steele disagreed, but the charges were withdrawn on March 22, 1988, and Major Gowan was cleared for retirement. Because Lt. Colonel Steele was dissatisfied with the withdrawal of charges, however, he called an anonymous fraud, waste, and abuse hotline run by the Air Force Systems Command

Inspector General ("AFSCIG") and reported Major Gowan's alleged improprieties. The call resulted in an inquiry to the Air Force Military Airlift Command Judge Advocate ("MACJA"), who in turn consulted Lt. Colonel Brower. Lt. Colonel Brower consulted the attorney working file and responded to MACJA, explaining the circumstances surrounding the preferral and withdrawal of charges against Major Gowan ("Brower letter"). AFSCIG concluded that the Steele complaint did not warrant investigation.

In 1987, 1988, and 1989, Major Gowan made a number of Privacy Act and Freedom of Information Act requests and sought amendment of many of the documents associated with the preferral proceeding. Before 1990, however, the Air Force did not permit amendment or the inclusion of statements of disagreement when the objectionable material was an opinion or subjective belief. The only entity that could change subjective material was the Air Force Board for the Correction of Military Records ("AFBCMR"). Air Force regulations provide no appeal from an AFBCMR decision and state that the Privacy Act provides no remedy. Air Force policy was changed in 1990 to allow the inclusion of statements of disagreement.

Two of the documents Major Gowan sought to amend resulted from his seeking the assistance of members of the United States Congress. While the charges against him were pending, Major Gowan had asked Senator Sam Nunn for assistance. Nunn sent Major Gowan's letter to the Office of the Legislative Liaison. That office's response, authored by a Colonel Nameth, was based upon the letter Brower had written in response to MACJA's inquiry regarding the Steele complaint ("Nameth letter"). Major Gowan requested the Air Force amend the Nameth letter. Two statements were amended and the remainder of Major Gowan's request was denied. Major Gowan's request to include a statement of disagreement was denied as well.

Major Gowan also complained to Senator Jeff Bingaman about the Air Force's treatment of him. Senator Bingaman sent that letter to the Air Force Legislative Liaison office and was responded to by a Colonel Alison ("Alison letter"). Major Gowan requested the Air Force amend the Alison letter. Amendment was denied, but Major Gowan's statement of disagreement was placed with the Alison letter and a copy was sent to Senator Bingaman.

Major Gowan also sought to amend several other documents, including the Steele fraud, waste, and abuse complaint, the Brower letter, and the Kirtland OSI file. The Air Force refused to amend the Steele complaint and the Brower letter on the grounds that they were not contained in Privacy Act systems of records. However, it allowed the amendment of the Kirtland OSI report to reflect what persons were in fact interviewed during the Kirtland OSI investigation.

Major Gowan filed this suit in the district court under the Privacy Act, 5 U.S.C. § 552a, on January 25, 1990. He sought injunctive relief and compensatory damages for the Air Force's refusal to amend documents or to allow him to attach statements of disagreement; its denying him access to his records despite his Privacy Act requests; its disclosures of the charge sheet; and its maintenance of inaccurate records. While the suit was pending, Major Gowan was given a copy of the attorney working file containing Major Kehl's and Major Ruppert's papers, several years after his initial request, and the AFBCMR took action on his requests to amend. The resolution of Major Gowan's requests took over four years because his file "fell through the cracks" at the AFBCMR.

The district court, United States Magistrate Judge Lorenzo Garcia presiding by consent of the parties, see 28 U.S.C. § 636(c), tried the case without a jury. Although the court sympathized with Major Gowan's concerns, it concluded that Major Gowan had not met the requirements of the Privacy Act. The court granted judgment for the Air Force and dismissed Major Gowan's suit with prejudice. Major Gowan appeals.

ANALYSIS

The Privacy Act of 1974, 5 U.S.C. § 552a, governs the government's collection and dissemination of information and maintenance of its records. The Privacy Act generally allows individuals to gain access to government records on them and to request correction of inaccurate records.

The Privacy Act provides four causes of action: first, for an agency's failure to review the denial of an amendment or to attach a statement of disagreement, see 5 U.S.C. § 552a(g)(1)(A); second, for an agency's denial of access to records, see 5 U.S.C. § 552a(g)(1)(B); third, for an agency's failure to maintain its records with accuracy, relevance, timeliness, and completeness to assure fairness in

determinations, see 5 U.S.C. § 552a(g)(1)(C); and fourth, for an agency's failure to comply with any other Privacy Act provision which causes an "adverse effect on an individual," see 5 U.S.C. § 552a(g)(1)(D). For the first two causes of action the court may award injunctive relief, and, if the plaintiff has "substantially prevailed," it may also award attorney's fees and costs. See 5 U.S.C. §§ 552a(g)(2), (g)(3). For the third and fourth causes of action, if the court determines the agency acted intentionally and willfully, it may award damages, attorney's fees, and costs. See 5 U.S.C. § 552a(g)(4).

I. Requests to Amend Records

The Privacy Act provides that individuals may request access to records on them, may request amendment of those records, and may attach a statement of disagreement to the record if amendment is refused. See 5 U.S.C. § 552a(d). It further provides that if an agency refuses to review the denial of a requested amendment or to attach a statement of disagreement the individual may file suit in the United States district court. See 5 U.S.C. § 552a(g)(1)(A). The district court may order the agency to amend the record or attach the statement of disagreement, and the individual may recover attorney fees and costs if he or she substantially prevails in the action. See 5 U.S.C. § 552a(g)(2).

In the district court, Major Gowan requested the Air Force be directed to amend the Nameth letter, the Alison letter, the Steele fraud, waste, and abuse complaint, and the Brower letter. He also complained about the Air Force's handling of his request to amend the Kirtland OSI report. On appeal, Major Gowan abandons his claims regarding the Alison letter and any argument that the Nameth and Brower letters should be amended. Instead, Major Gowan seeks only to include statements of disagreement with the Nameth and Brower letters. In its brief the Air Force submits that it is willing to and will attach statements of disagreement to the Nameth and Brower letters. In light of this representation, we assume that the Air Force has or will immediately voluntarily comply with the Privacy Act and attach Major Gowan's statements of disagreement to the Nameth and Brower letters. See 5 U.S.C. § 552a(d)(3) ("Each agency that maintains a system of records shall . . . [if amendment is denied] permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency [to

amend] . . . ."). Thus, the only remaining amendment issues concern the Steele fraud, waste, and abuse complaint, the Kirtland OSI report, and the propriety of the Air Force amendment referral process.

A. Steele Fraud, Waste, and Abuse Complaint

The Steele complaint was processed by the Office of the Inspector General. The district court held that (1) the Steele complaint is not amendable because it is a statement of opinion, and (2) the Privacy Act does not apply because "[c]omplaints made to the Inspector General are exempt from disclosure." Because we affirm on the second basis, we do not need to address the first reason for the district court's ruling.

The district court correctly held that the Air Force has exempted the Inspector General's records from § 552a(d) of the Privacy Act. Under 5 U.S.C. § 552a(k)(2):

> The head of any agency may promulgate rules . . . to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is-
>
> . . .
>
> (2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however*, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual . . .
>
> .

The Air Force has promulgated a regulation to exempt Inspector General records from disclosure under the Privacy Act. See 32 C.F.R. Pt. 806b, App. C, § (b)(12) (1997).[1] Steele's fraud, waste, and abuse complaint, which alleged possible violations of military and federal law, comes within § 552a(k)(2)'s specification of "investigatory material compiled for law enforcement purposes." See Viotti v. United States Air Force, 902 F. Supp. 1331, 1335 (D. Colo. 1995). Although Major Gowan argues that fraud, waste, and abuse *complaints* do not constitute "investigatory material," the complaint is the catalyst of the investigation and thus comes within the parameters of § 552a(k)(2). Further, the charges contained in the complaint were deemed unworthy of further action, so that § 552a(k)(2)'s exception, which

requires disclosure where the subject has been denied a benefit because of the record, is inapplicable. Cf. Viotti, 902 F. Supp. at 1336. Because this fraud, waste, and abuse complaint is properly exempt from § 552a(d), Major Gowan does not have a Privacy Act cause of action to require the Air Force to amend the records or attach a statement of disagreement. "Where, as here, an agency has properly exempted its records, the agency no longer has any obligation to disclose those records--irrespective of the underlying motives of the agency or the impact of the records upon the parties." Nolan v. United States Dept. of Justice, 973 F.2d 843, 848-49 (10th Cir. 1992); see also Aquino v. Stone, 957 F.2d 139, 143 (4th Cir. 1992); Doe v. Federal Bureau of Investigation, 936 F.2d 1346, 1352 (D.C. Cir. 1991); Alexander v. United States, 787 F.2d 1349, 1351-52 (9th Cir. 1986); Wentz v. Department of Justice, 772 F.2d 335, 338 (7th Cir. 1985) ("You cannot amend a document if you don't have access to it.").

B. Kirtland OSI Report

Major Gowan also contends that the Kirtland OSI report should be amended. The AFBCMR amended the report to show which individuals in fact were interviewed, but denied the remainder of Major Gowan's request to amend. The district court held that under § 552a(k)(2) the Kirtland OSI report was exempted from the provisions of § 552(d), but did not specify which § 552a(k)(2) exemption it relied upon. We agree with the district court that the Kirtland OSI report is exempted from the requirements of § 552a(d), but disagree on which exemption section to apply. However, we may affirm on any ground supported by the record. See United States v. Knox, 124 F.3d 1360, 1362 (10th Cir. 1997).

None of the specific exemptions promulgated under § 552a(k)(2) seems to apply to the Kirtland OSI report. See 32 C.F.R. Pt. 806b, App. C(b) (1997). Besides the specific exemptions enumerated in 5 U.S.C. § 552a(k)(2), however, the Privacy Act provides that law enforcement materials generally may be exempted from otherwise applicable Privacy Act requirements. See 5 U.S.C. § 552a(j)(2). The general exemption section, § 552a(j)(2), states:

The head of any agency may promulgate rules . . . to exempt any system of records within the agency from any part of this section

except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is-

. . .

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of . . . (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual . . . .

The Air Force has promulgated regulations under § 552a(j)(2) exempting certain material from the requirements of § 552a(d), including "Investigative Support Records" and "Criminal Records." See 32 C.F.R. Pt. 806(b), App. C(a) (1997).[2] The "Investigative Support Records" category includes "[r]eports of investigation, collection reports, statements of individuals, affidavits, correspondence, and other documentation pertaining to criminal collection activities investigative surveys . . ." which are used "by AFOSI to determine if, in fact, possible criminal activity requiring further specialized investigation is occurring in a specific area" and "by USAF and other military commanders as well as Department of Justice officials to determine if judicial or administrative action is warranted." See Department of Defense System of Records Notices, 50 Fed. Reg. 22,090, 22,492 (1985). The "Criminal Records" system includes "[r]eports of investigation, statements of individuals, correspondence, and other informational material pertaining to specific investigations of alleged violations of laws, regulations or directives" which are used "in taking judicial and administrative actions involving suspected criminal activity concerning [Department of Defense] personnel" and "to determine if legal or administrative action is warranted." See id. at 22,491.

The OSI report at issue fits both of these categories. It is located in a system of records maintained by the Kirtland OSI, a law enforcement body; it consists of information compiled for the purpose of a criminal investigation and associated with an identifiable individual; and it has been the subject of the proper rule-making procedures. Consequently, it is exempt under § 552a(j)(2). See Nolan, 973 F.2d at 847. As stated

above, Major Gowan has no Privacy Act cause of action regarding exempted records, and thus he cannot challenge the Air Force's refusal to make further amendments to the Kirtland OSI report. See id. at 848-49.

C. Air Force Referral Process

Beyond challenging the Air Force's handling of his specific amendment requests, Major Gowan quarrels with the Air Force's amendment process itself. Before about 1990, the Air Force Privacy Act program automatically referred requests for amendment of "subjective" or "opinion" matters to the AFBCMR. Major Gowan complains that the AFBCMR did not allow the attachment of statements of disagreement or judicial review. Consequently, he seeks injunctive relief to ensure that the Air Force complies with the provisions of the Privacy Act.

The Privacy Act clearly grants individuals the right to seek agency review of a denial of a request to amend, to file a statement of disagreement, and to seek judicial review of the agency's determination. See 5 U.S.C. §§ 552a(d)(3), (g)(1)(A). Therefore, any Air Force policy that provides to the contrary would be invalid under the Act. However, Major Gowan's Privacy Act complaints have been resolved through this judicial action, and the Air Force eliminated its nonconforming policy in about 1990. Although Major Gowan asserts that he may in the future want to seek amendment of Air Force records and that the Air Force may again wrongfully deny his Privacy Act right to seek amendment or the filing of a statement of disagreement, an assertion of such a contingent interest is insufficient to confer standing. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 563-64 (1992). As a result, we decline to hear his challenge to the AFBCMR referral process.

Finally, Major Gowan alleges that the Air Force failed to comply with the Privacy Act when it did not inform him of his right to seek judicial review of its denial of his requests to amend. See 5 U.S.C. § 552a(d)(3) (requiring the agency to notify the individual of the provisions for judicial review under 5 U.S.C. § 552a(g)(1)(A)). To redress violations of § 552a(d)(3), a plaintiff may secure injunctive relief and, if he has substantially prevailed, recover attorney's fees and costs. See 5 U.S.C. §§ 552a(g)(1)(A), (g)(2). Given that Major Gowan was obviously aware of his right to seek judicial review,

however, we find it unnecessary to award him injunctive relief, and we determine that he should not be awarded attorney's fees under 5 U.S.C. § 552a(g)(2)(B).

II. Access to Records

Major Gowan argues that the Air Force violated the Privacy Act by not turning over all materials in response to his Privacy Act request. Specifically, he complains that he did not receive the materials contained in the attorney working file (the file set up by Gampel which included Major Kehl's "Ethics" file and Major Ruppert's papers) until more than six years after his first Privacy Act request, four years after he filed this case in the district court.

The Privacy Act grants individuals access to their records. See 5 U.S.C. § 552a(d)(1). However, only "records" kept in a "system of records" are subject to the provisions of § 552a(d). See Wren v. Heckler, 744 F.2d 86, 89 (10th Cir. 1984). The Privacy Act defines a record as "any item, collection, or grouping of information about an individual that is maintained by an agency . . . that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(4). A "system of records" is defined as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). To redress violations of § 552a(d)(1), the district court may award injunctive relief, and, if the plaintiff has substantially prevailed in the action, attorney fees and costs. See 5 U.S.C. §§ 552a(g)(1)(B), (g)(3). The only file in existence at the time of Major Gowan's first request was the "Ethics" file. By the time of his second request, the "Ethics" file had been incorporated into an attorney working file. The district court concluded that neither the "Ethics" file nor the attorney working file were maintained in a Privacy Act "system of records," and that those files were not retrievable by means of Major Gowan's name or other identifier. On appeal, Major Gowan argues that (1) the designate "Ethics" was in fact an identifier personal to Major Gowan, so that the "Ethics" file was part of a system of records and thus subject to the Privacy Act, and (2) even if the "Ethics" file was *not* part of a Privacy Act system of records, it *should have been* because it was used in determining Major Gowan's rights, privileges, and benefits.[3]

Major Gowan contends that "Ethics" was in fact a code word referring to him, and thus in effect was a "personal identifier." We recognize the possibility that an unscrupulous person may try to mask a record properly subject to the Privacy Act by labeling it with a generic code word that effectively acts as a "personal identifier." However, the testimony before the district court does not indicate that here the designation "Ethics" equals an "identifying particular assigned to the individual." Major Kehl testified that his file was "not a folder about any individual in particular," and that at the time of the investigation into Major Gowan's activities "there was other information in this file about people other than Mr. Gowan, because my evaluation of ethics issues included other people besides Mr. Gowan." On this record, we must conclude that the word "Ethics" was not a personal identifier of Major Gowan and we do not find the district court's rulings regarding those documents to be clearly erroneous. See Wren v. Heckler, 744 F.2d at 89 (documents contained in files entitled "Regional and Field Hearing Office" were not part of a "system of records" because they were not retrievable by "plaintiff's name or other identifying symbol" even though they contained information about the plaintiff); see also Hudson v. Reno, 130 F.3d 1193, 1206 (6th Cir. 1997) (notes kept in locked drawer in file labeled as "First Assistant's" file not part of a Privacy Act system of records even though they contained information about the plaintiff).

Alternatively, Major Gowan contends that the file *should* have been put into the system of records under 5 U.S.C. § 552a(e)(5) -- which directs agencies to maintain complete and accurate records to ensure fairness in determinations -- because Major Kehl, Major Ruppert, Gampel, and Lt. Colonel Brower actually used the file in making decisions about him. Although the court may award damages, attorney fees and costs upon finding that an agency intentionally and willfully failed to maintain records with such accuracy and completeness as to ensure fairness, see 5 U.S.C. §§ 552a(g)(1)(C), (g)(4), the record on appeal does not demonstrate that Major Gowan raised this issue in the district court. The district court never addressed the issue, and the pretrial report does not adequately set forth the contention that the files should have been maintained in a Privacy Act system of records. Although Major Gowan asserts that he raised the issue below in his Proposed Findings of Fact and

Conclusions of Law, that filing has not been submitted as part of the appellate record. Because it is impossible to review the arguments made before the district court, we decline to address this issue on appeal. See United States v. Vasquez, 985 F.2d 491, 494 (10th Cir. 1993) ("When the record on appeal fails to include copies of the documents necessary to decide an issue on appeal, the Court of Appeals is unable to rule on that issue."); 10th Cir. R. 10.3 ("When the party asserting an issue fails to provide a record sufficient for consideration of that issue, the court may decline to consider it.").

III. Methods of Collecting Information

Major Gowan also contends that the Air Force violated the Privacy Act when the Kirtland OSI, Major Kehl, Major Ruppert, Gampel, and Lt. Colonel Brower failed to gather information from him directly rather than from third parties. See 5 U.S.C. § 552a(e)(2) ("Each agency that maintains a system of records shall . . . collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs."). The district court may award damages, attorney fees, and costs for an intentional and willful violation of § 552(e)(2) that results in an adverse effect on the plaintiff. See 5 U.S.C. §§ 552a(g)(1)(D), (g)(4).

Major Gowan did not include this issue in the pre-trial report, and so it was not part of the case before the district court. See Hernandez v. Alexander, 671 F.2d 402, 407 (10th Cir. 1982) (pre-trial report controls course of litigation). In support of our conclusion, the district court made no ruling on this issue. We generally do not consider issues not raised before the trial court, and so we find that this claim has been waived. See Vitkus v. Beatrice Co., 127 F.3d 936, 946 (10th Cir. 1997).

IV. Methods of Maintaining Records

Major Gowan suggests that the Air Force's maintenance of inaccurate and incomplete records, namely the Kirtland OSI report and the "Ethics" file, violated 5 U.S.C. § 552a(e)(5), which requires agencies to "maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." To redress intentional and willful violations of § 552a(e)(5), the court may award damages,

attorney's fees and costs. See 5 U.S.C. §§ 552a(g)(1)(C), (g)(4). To succeed with this claim, Major Gowan must show:

(1) he has been aggrieved by an adverse determination; (2) the [agency] failed to maintain his records with the degree of accuracy necessary to assure fairness in the determination; (3) the [agency's] reliance on the inaccurate records was the proximate cause of the adverse determination; and (4) the [agency] acted intentionally or willfully in failing to maintain accurate records.

Deters v. United States Parole Comm'n, 85 F.3d 655, 657 (D.C. Cir. 1996).

Major Gowan has no § 552a(e)(5) cause of action regarding either the Kirtland OSI report or the "Ethics" file. As discussed above, the Kirtland OSI report is exempted from several of the requirements of the Privacy Act, including § 552a(e)(5). See 5 U.S.C. § 552a(j)(2); 32 C.F.R. Pt. 806b, App. C(a) (1997). Further, the "Ethics" file is not a "record" in a Privacy Act "system of records," and thus Major Gowan has no § 552a(e)(5) cause of action for Kehl's maintenance of the "Ethics" report. See Clarkson v. Internal Revenue Serv., 678 F.2d 1368, 1377 (11th Cir. 1982).

V. Dissemination of Charges

Finally, Major Gowan claims that the Air Force violated 5 U.S.C. § 552a(b) by disclosing information about the charges against him to various third parties. He contends that the Privacy Act was offended by Amor's discussion of the charges during a telephone conference with other Air Force personnel, by Elder's release of the charges to the Wyoming Bar, and by the Air Force's discussion of the charges in response to inquiries by United States senators.

Under 5 U.S.C. § 552a(b), agencies are prohibited from "disclos[ing] any record which is contained in a system of records by any means of communication to any person, or to another agency" unless they have the written consent of the individual to whom the record pertains or the disclosure fits one of twelve listed exceptions. If an agency intentionally and willfully violates § 552a(b) and the plaintiff suffers an "adverse effect" from the violation, the agency is liable for the plaintiff's actual damages as well as attorney's fees and costs. See 5 U.S.C. §§ 552a(g)(1)(D), (g)(4). Consequently, to maintain a § 552a(b) claim, a plaintiff must show: (1) the information came from a "record" in a "system of records"; (2) it was communicated to another

entity; (3) the communication was without the individual's consent or does not fit one of the enumerated exceptions; (4) the communication was made intentionally or willfully; and (5) the communication caused an "adverse effect" on the plaintiff. See also Pippinger v. Rubin, 129 F.3d 519, 528 (10th Cir. 1997) ("In analyzing each of these three claims, we must decide whether a record was 'disclosed,' and, if so, whether it was disclosed pursuant to an exception enumerated in 5 U.S.C. § 552a(b).").

The district court held that the preferral of charges against Major Gowan was a matter of public record and thus disclosure of the charges did not violate § 552a(b). We disagree with the district court's conclusion that a matter of public record is not subject to the provisions of 5 U.S.C. § 552a(b). In Quinn v. Stone, 978 F.2d 126, 134 (3d Cir. 1992), the Third Circuit rejected an argument that a disclosure of public information cannot violate the Privacy Act:

> Appellees have cited to this court no case that stands for the proposition that there is no violation of the Act if the information is merely readily accessible to the members of the public (such as in the local telephone book) and our research has discovered none. We doubt if any court would so hold. To do so would eviscerate the Act's central prohibition, the prohibition against disclosure. . . . To define disclosure so narrowly as to exclude information that is readily accessible to the public would render superfluous the detailed statutory scheme of twelve exceptions to the prohibition on disclosure. We conclude the making available information which is readily accessible to the members of the public is a disclosure under 552a(b), subject, of course, to the Act's exceptions.

(footnote omitted). See also United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762-64 (1989) (upholding privacy interest in rap sheet, even though components of summary are in public record). We adopt the Third Circuit's reasoning and hold that an agency may not defend a release of Privacy Act information simply by stating that the information is a matter of public record.

A. Telephone Conference

The district court found that Colonel Amor's discussion of the charges against Major Gowan during a telephone conference with other Air Force officers and staff did not violate the Privacy Act because the

charges were a matter of public record and because Colonel Amor may have had independent knowledge of the preferral of charges. "Section 552a(b) of the Privacy Act by its terms contemplates a 'system of records' as the direct or indirect source of the information disclosed. The disclosure of information derived solely from independent sources is not prohibited by the statute even though identical information may be contained in an agency system of records." Thomas v. United States Dep't of Energy, 719 F.2d 342, 345 (10th Cir. 1983). The Air Force indicates that Colonel Amor was Major Gowan's commanding officer and that he was kept apprised of the investigation as it progressed. However, we need not decide whether this satisfies the "independent source" exception. Cf. id. at 344 (supervisor's information came from personal participation in discussions about plaintiff and being told to order plaintiff to undergo psychiatric evaluation, not from plaintiff's records).

In this case the district court did not make an unequivocal finding that Colonel Amor's information was all derived independently of a record pertaining to Major Gowan found in a system of records. In any event, in order to recover, Major Gowan must prove that Colonel Amor's conduct was "intentional or willful." See 5 U.S.C. § 552a(g)(4). The district court did not make this essential finding, and thus Major Gowan cannot recover on this claim. Because of our ruling, we need not address the Air Force's argument that this disclosure can be justified under the "need to know" exception found in § 552a(b)(1).

B. Wyoming Bar

Major Gowan also contends that the Air Force is liable for Elder's informing the Wyoming Bar of the court martial charges. The district court again held that the charges were public knowledge, but it also held that Elder's actions were not intentional and willful, and thus Major Gowan could not recover. However, we need not decide whether Elder's actions were intentional and willful. See Knox, 124 F.3d at 1362 (court of appeals may affirm on any ground supported by the record). To recover for a violation of § 552a(b), Major Gowan must also show that the Air Force's disclosure had an "adverse effect" on him. See 5 U.S.C. § 552a(g)(1)(D). Major Gowan himself informed the Wyoming Bar of the court martial charges without knowing Elder had already done so. Consequently, Elder's providing the same information (even though before Major Gowan did so) could not have

had an adverse effect on Major Gowan. Cf. Kline v. Department of Health & Human Serv., 927 F.2d 522, 524 (10th Cir. 1991) ("A later release of information previously known does not violate the Privacy Act.").

C. Responses to United States Senators

Major Gowan's final complaints about improper communications concern the Air Force's responses to the letters sent by United States Senators Nunn and Bingaman. Although this issue was raised below, the district court did not resolve it.

The senators' inquiries resulted directly from Major Gowan's soliciting their assistance. Unlike in Swenson v. United States Postal Serv., 890 F.2d 1075, 1077-78 (9th Cir. 1989), where the disclosure of information to congressmen violated the Privacy Act because the information had nothing to do with the subject the plaintiff had asked her legislators to investigate, Major Gowan requested the senators to inquire about the matters he now complains the Air Force discussed with them. Under these circumstances, Major Gowan's request for the senators' assistance estops him from complaining that the Air Force responded to the senators' inquiries on his behalf. See Pellerin v. Veterans Admin., 790 F.2d 1553, 1556 (11th Cir. 1986) ("Pellerin clearly solicited his congressmen's support in his battle with the VA. He cannot state a claim against the VA for releasing information to the congressmen when he requested their assistance in gathering such information.").

In addition, § 552a(b)(3) establishes a "routine use" exception to the general prohibition on disclosure. See 5 U.S.C. § 552a(b)(3). Disclosure of information regarding an individual to members of Congress in response to "an inquiry from the congressional office *made at the request of that individual*" has been established as a routine use of Privacy Act information. See Department of Defense Privacy Act Program, 51 Fed. Reg. 2364, 2389 (1986) (emphasis added). We do not believe that the dissemination of this information in response to the senators' inquiries is incompatible with the purpose for which the information was collected, see 5 U.S.C. § 552a(a)(7), and thus the disclosures would likely be protected under the routine use exception.

D. Attorney's Fees and Costs

BEST AVAIL

A Privacy Act plaintiff may be awarded attorney's fees and costs. For suits under 5 U.S.C. §§ 552a(g)(1)(A) and (g)(1)(B), to be eligible for fees and costs the plaintiff must have "substantially prevailed." See 5 U.S.C. §§ 552a(g)(2)(B), (g)(3)(B). For suits under 5 U.S.C. § 552a(g)(1)(C) and (g)(1)(D), there is no requirement that the plaintiff have "substantially prevailed" to be awarded fees, but the court must determine that the agency acted intentionally or willfully. See 5 U.S.C. § 552a(g)(4).

Major Gowan's success in this lawsuit was limited to getting the statements of disagreement added to the Brower and Nameth letters and in obtaining access to the attorney working file. Both of these successes come under the portions of the Act that require a plaintiff to "substantially prevail[]" in order to receive attorney's fees and costs. See 5 U.S.C. §§ 552a(g)(1)(A), (g)(1)(B), (g)(2)(B), (g)(3)(B).

In Volz v. United States Dept. of Justice, 619 F.2d 49, 50 (10th Cir. 1980), we concluded without analysis that the plaintiff had not "substantially prevailed" in his Privacy Act suit despite the fact that the agency had released some of the information after the suit was filed. We have not had occasion since Volz to determine whether a plaintiff has "substantially prevailed" for purposes of obtaining fees under the Privacy Act. However, we note that the Privacy Act attorney's fee provisions are substantially similar to the fee provision of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(4)(E). Consequently, like at least two of our sister circuits, we shall apply a FOIA attorney's fee analysis to this Privacy Act case. See Sweatt v. United States Navy, 683 F.2d 420, 423 (D.C. Cir. 1982) (per curiam) (applying FOIA principles to determine whether plaintiff "substantially prevailed" under Privacy Act); Barrett v. Bureau of Customs, 651 F.2d 1087, 1088 (5th Cir. 1981) (same); see also Clarkson, 678 F.2d at 1371 (applying Privacy Act analysis to FOIA claim for fees).

In the FOIA attorney's fee context, we have held that a plaintiff must establish both that he or she is eligible for an attorney's fee award and that he or she is entitled to it. To show eligibility for the award, the plaintiff must show that he or she has "substantially prevailed" on his claim. See Anderson v. Secretary of Health and Human Serv., 80 F.3d 1500, 1504 (10th Cir. 1996). If the plaintiff has "substantially prevailed," the court must evaluate four factors to decide whether he or she is entitled to an award: "'(1) the benefit to the public, if any,

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derived from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding of the records had a reasonable basis in the law.'" Id. (quoting Aviation Data Serv. v. FAA, 687 F.2d 1319, 1321 (10th Cir. 1982)).

The plaintiff has "substantially prevailed" in a FOIA case if the lawsuit was reasonably necessary and substantially caused the requested records to be released. See Chesapeake Bay Found., Inc. v. Department of Agriculture, 11 F.3d 211, 216 (D.C. Cir. 1993); see also Alan R. Gilbert, Annotation, Construction and Application of Freedom of Information Act Provision (5 USCS § 552(a)(4)(E)) Concerning Award of Attorney Fees and Other Litigation Costs, 36 A.L.R. Fed. 530 § 4 (1978 & Supp. 1997). However, the Air Force contends that its release of the file and its willingness to attach the statements of disagreement were not motivated by Major Gowan's lawsuit but by new, less restrictive directives issued during the pendency of the litigation.

Even assuming that the attachment of the statements of disagreement and the release of the file were motivated by the lawsuit, so that Major Gowan is *eligible* for a fee award, under the factors we have identified he is not *entitled* to one. Although the government was not justified in refusing to act according to the clear directives of the Privacy Act, Major Gowan's suit was for his personal benefit rather than for the benefit of the public interest and he gained no commercial benefit from the attachment of the statements of disagreement or the release of the file. Given Major Gowan's limited success in this suit, especially in light of the fact that he had requested $13,300,000 in damages but received none, we do not believe he is entitled to an award of fees and costs.

CONCLUSION

For the reasons stated above, the judgment of the district court is AFFIRMED.

FOOTNOTES

Click footnote number to return to corresponding location in the text.

1. This regulation was originally promulgated in 1986. See Rules and Regulations, Department of Defense, 51 Fed. Reg. 20,277, 20,284 (1986).

[2] This regulation was originally promulgated in 1986. See Rules and Regulations, Department of Defense, 51 Fed. Reg. 20,277, 20,283 (1986).

[3] In making this argument, Major Gowan does not appear to recognize that there were two files: the "Ethics" file itself and the attorney working file. Neither the parties nor the district court identify how the attorney working file was kept, but the district court found that it was not kept under Major Gowan's name or other personal identifier. Consequently, we will confine our discussion to the points raised by Major Gowan and focus solely on the "Ethics" file.

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Appendix B -- The Privacy Act of 1974, 5 U.S.C. 552a, Citations of Pertinent Law by Subsection

5 U.S.C. § 552a(a)(3) Definitions provides: "the term 'maintain" includes maintain, collect, use, or disseminate; (4) the term " record" means any item, collection, or grouping of information about an individual that is maintained by an agency...that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual...(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." (7) the term 'routine use' means with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

5 U.S.C. § 552a(b) Conditions of Disclosure – No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be – (1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties, (3) for a routine use...

5 U.S.C. § 552a(d) Access to Records – "Each agency that maintains a system of records shall – upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to

him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence; (2) permit the individual to request amendment of a record pertaining to him and – (A) not later than10 days...after the date of receipt of such request, acknowledge in writing such a receipt; and (B) promptly, either – (I) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or (ii) inform the individual of its refusal to amend the record in accordance with his request, the reason, for the refusal, the procedures, established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that officials; (3) permit in the individual who disagrees with the refusal of the agency to amend his records to request a review of such refusal, and not later than 30 days... from the date on which the individual requests such a review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the records in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under 5 U.S.C. § 552a(g)(1)(A) of this section;"

5 U.S.C. § 552a(e): Agency Requirements. "Each agency that maintains a system of records shall— maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose for the agency required to be accomplished by statute or by executive order of the President; (2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations

about an individual's rights, benefits, and privileges under Federal programs; (4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include--...(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness as is reasonably necessary to assure fairness to the individual in the determination. (6) prior to disseminating any record about an individual to any person other than an agency, ... make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes; (7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained... (8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal press when such process becomes a matter of public record; (9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records....(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment inconvenience, or unfairness to any individual on whom information is maintained."

5 U.S.C. § 552a(g)(3)(A) provides: "The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed."

5 U.S.C. § 552a(g)(4) provides: "In any suit brought under the provisions of Subsections (g)(1)(C) or (D) of

this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of: (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000. (B) the costs of the action together with reasonable attorney fees as determined by the court.

5 U.S.C. § 552a(i)(1) Criminal Penalties. "Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000."

Appendix C -- Testimony of Witnesses in the District Court for the District of New Mexico

a. "I went to Major Kehl's office and got this stack of documents that I referred to earlier in my testimony. Q. And I believe that that stack of documents that you referred to was Exhibit N, Defendant's Exhibit N? A. I don't know that all of this was in here, but I would say probably--my recollection is that either something like this or something in an alligator clip. Q. Was it a stack of documents that pertained to Mr. Gowan? A. Yes. Q. Was there anybody -- was there information about other persons suspected of ethical concerns besides Mr. Gowan in either this file or alligator clip that you referred to? A. I don't recall anything else on anyone else in terms of what I was provided. Q. And this stack of documents was identified to you by Major Kehl as the evidence that he had compiled on Major Gowan? A. Yes."

b. Q. Okay, Do you know whether or not attorney work product is exempt under the Privacy Act? A. Yes, they are exempt, for civil actions, not criminal actions. P94, line 6 Q the reason you changed the policy [on statements of disagreement] is because you decided that Mr. Gowan was absolutely right, isn't it? That he had a right to file a statement of disagreement? A. ...yes. Q. In fact, it was your opinion that the Air Force policy as of 1988, denying a citizen the right to file a statement of disagreement was inconsistent with Privacy Act law. A. Yes, sir, that's right.

c. We use the general counsel that served as the counsel to the secretary [Air Force], any other kind of official. The Court: Is that counsel for JAG. Witness: No. The Court: I guess I'm curious. When you were telling me about making references

to particular offices that have the available information, I understood that the referral in this case was to the JAG office; is that correct. Witness: That's correct. The Court: But the complaint was against the JAG office. Isn't that rather like asking the fox to guard the hen house? ... The Court: Who did the analysis for the final decision, as opposed to the advisory opinion? Was that also JAG counsel? Witness: That was JAG, yes.

d. Q. Major Ruppert, before taking the lunch break, you testified about the practice that you're aware of, of the OSI preparing intentionally misleading reports, and you said that that often occurred in drug cases, is that correct? A. That's the only kind of case that I have seen. Q. And your testimony was that the OSI would sometimes prepare a decoy report, so to speak, for dissemination to the – perhaps the suspects, and keep an accurate report for their own purposes? A. They would publish interim reports before their final report that had masked identities and different statements attributed to different people but maybe in incorrect order, and that sort of thing. The final report would be correct. Q. And I understand you learned of this practice through your duties as a prosecutor with the judge advocate's office? A. Yes. Q. Did you ever object to this practice? A. I questioned it initially upon learning about it, and why it was done. Q. Did you ever advise that – anyone within your capacity to advise that you thought the practice was improper? (Defense Objects) The Court: I'm going to overrule the objection. This cooking-the-books testimony I think is quite startling about record keeping and obligations under the privacy act. You may answer the question. Page 108, line 3: Q. Did you ever criticize that practice as part of you procedures with the JAG office? A. No, I did not.

e. Q. I direct you attention to what's been marked as Defendant's Exhibit M for identification. Do you recognize that? A. I'd looked at it earlier. It appears to be the same file. I, of course, can't say that all the documents are the same, but it looks like the same file that I took from Colonel Brower's table in Colonel Brower's office when he transferred out from Kirtland. Q. When was that? A. That was in early 1990. I don't remember the exact time. It was after we learned that CMD was going to go away; after, I believed at least, that I would stay at Kirtland AFB and would continue to have responsibility for labor and EEO matters, including litigation. I had already worked in this case and so I wanted to make sure that all of the information that the Air Force had relating to Mr. Gowan at that time was preserved. And there was, like I say, a pile of things. This file I perceive to be the file maintained by the chief of military justice and relating to what actions had occurred in relation to the court-martial charges brought against Mr. Gowan. And I put them in a file, and I kept them until I released them to you, I believe... Q. Did you alter them once you got them? A. No. I don't even—I went through them a couple of times, as we changed US attorneys, and as we changed people in the litigation division of the Air Force that were assigned responsibility for this case, to tell them again what I had, because they were always interested in what kind of documentation we had.

f. The OSI report is amended to delete the names of Laura Carson, Steve Eagon, Anthony Hoyt and William McMullen from the list of individuals identified as being interviewed. Q: And a supervisor should have recognized that the case had been pending for some four and a half years? A: Exactly. Q: But you had no explanation for why that wasn't brought to anyone's attention? A: That's right. That's right. Q: How did you come to request this record back

from the IG? A: My understanding is that litigation called my boss sometime in, I believe, middle of December, inquiring about the status of the case. During that time, we discovered that the case was lost. My boss gave the case to me and at that time, we knew we had a court date and asked me to do the best I could to get the case to the Board and obtain a final decision before the Court did.

g. "SUBJECT reported to KEHL during the application process for off-duty employment that the technology he was seeking to market was discovered while stationed at the European Office of Aerospace Research and Development (EOARD). SUBJECT stated while working at EOARD he routinely recommended technology discovered in official travels. This technology would then be evaluated by the Air Force for future study or development. SUBJECT stated to KEHL that it was during one of these trips that he visited Trondheim University, Trondheim, Norway. It was here that SUBJECT discovered research being conducted on Electronic Speckle Pattern Interferometry. (ESPI) SUBJECT stated to KEHL that this information was reported to the Air Force at EOARD, however, no research funding was forthcoming nor was any attempt made to purchase this technology based on SUBJECT's proposal."

Appendix D

Magistrate Judge's Findings of Fact, District Court for the District of New Mexico

2. Gowan joined the Air Force in 1968 as a Second Lieutenant, and at the time of his retirement, held the rank of Major. A review of his officer effectiveness reports from 1977 through 1988 shows that he was a highly regarded, talented, and respected officer.

4. Gowan is recognized as a national authority in the field of high-energy laser optical materials and technology. He was considered one of the two or three most outstanding metallurgists in the Air Force, as well as "one of the outstanding scientists in Advanced Radiation Technology." Gowan was considered to have a renowned reputation both in the Air Force and the scientific community.

5. Gowan was awarded five patents for optics design and was the recipient of the first Edward B. Giller Award for the most outstanding technical achievement in science and engineering in the Air Force Weapons Laboratory, Kirtland AFB, New Mexico, 1978 – 1979. Gowan received fifteen separate awards for scientific and engineering excellence over the course of his military career. [Finding shortened]

6. Gowan typically received a superior rating in his evaluations as an Air Force officer. Gowan's evaluations are replete with laudatory terms and descriptive phrases. His superior officers used words such as "highest personal, ethical, and professional standards," "gifted scientist," "leading edge of tomorrow's Air Force," "brilliantly innovative," "integrity marked with persistence," "tremendous value to the Air Force," "selfless individual," "renown reputation", and "absolutely outstanding officer." [Finding shortened]

7. The only discordant comments in the evaluations were that Gowan was perceived as an advocate for the poor, down-trodden and oppressed. The evaluator's comments concerning Gowan's advocacy are correct. [Finding shortened]

9. In 1981, Gowan was assigned to the European Office of Aerospace Research and Development (EOARD) [London, UK]. Gowan was at EOARD until 1984.

12. Gowan reported major breakthroughs in a new technology that allowed non-destructive testing of materials by use of holographic evaluations and ESPI. he sought to alert the Air Force to the potential for this process and sought to enlist the Air Force's assistance in conducting a study of this process. [Finding shortened]

15. The Air Force took no action on his request for further study.

17. Gowan's repeated efforts and recommendations to pursue this developing technology, the Air Force was not interested in Gowan's or Hoyt's proposals. In February 1987, the Department of the Air Force formally rejected Major Gowan's recommendation. [Finding shortened]

18. In 1984, Gowan was reassigned to KAFB.

23. Gowan became an advocate and employee representative for Hernandez, who was involved in an on-going dispute with the Air Force. Gowan was a vocal proponent of equality and fair treatment of employees, and became involved with Hernandez in an organization called Libertad Advocates. Gowan actively promoted equal employment opportunity (EEO) matters as part of his involvement with Libertad Advocates. [Finding shortened]

27. On March 6, 1986, Gowan made his first notice and request for approval of off-duty employment with Applied Optical Systems, Inc. ("AOS").

33. Gowan's notice and request was approved on March 14, 1986. It had been approved by Major Bennie Miller, Colonel Jerome Janick and [Randall H.] Kehl, [JA].

35. On November 6, 1986, [after Gowan changed jobs] Kehl approved Gowan's off-duty employment request. Gowan's request had been approved by Lt Colonel William Finley and by Lt Colonel Richard Steele.

36. During the same month, a distribution agreement and option agreement was entered into by AOS and Conspectum A/S.

45. The first year and up to the early part of 1988, three Retra 1000 devices were sold. One to Beta Industries ($51,000), one to Unysis ($75,000) and one to Hughes [Aircraft].

46. Given the potential of the portable scanner and the interest shown, AOS-NDTIE and Stoller estimated profits of three-million dollars over a three-year period.

54. Notwithstanding his earlier advice and the fact that Kehl had twice before approved Gowan's off-duty work request, Kehl felt there might be a potential ethics problem.

56. The OSI began its inquiry on July 1, 1987.

60. In a re-interview with Kehl, Kehl stated that there were no apparent violations of Title 18, USC Section 208 and that the Air Force had no financial interest in the technology and that the technology could not be considered property. There was still a concern of a "perceived" violation of Air Force Reg. 30-30.

61. The OSI compiled a written report, sent it to Kehl without any finding of a violation, and closed the inquiry.

66. Being dissatisfied that OSI failed to find a violation, Kehl renewed his request for a new investigation and asked that Major Mark Ruppert, who was at the time on loan to KAFB, look into the allegations.

68. Kehl gave Ruppert the manila file that he kept in his desk drawer.

71. Ruppert, inexplicably, did not interview Gowan.

74. Ruppert learned of this [Gowan's "whistle blower" activity] through Kurt Klossner, an FBI agent. [Finding shortened]

76. Brower did EEO work and was concerned that Gowan would view the preferral charges as a retaliatory action. [Finding shortened]

84. Kehl and Steele were primarily responsible for pursuing the investigation and preferral of charges against Gowan. [Finding shortened]

86. Because of the preferral of charges, Gowan was put on administrative and could not retire as scheduled and pursue his technological development plans.

87. The delay in Gowan's retirement was viewed as the last straw for Stoller. The OSI investigation had interfered with and delayed the marketing plans. Now, with the delay in Gowan's retirement, and, indeed, prospect of a court-martial, Stoller pulled funding for the development and marketing of Conspectum A/A' products in February 1988. Thus, Gowan's economic prospects were materially and adversely affected.

96. Brower and Gampel concluded that the allegation that Gowan received a gratuity was meritless because

Gowan had spent $40,000 in seed money and had sufficient evidence to rebut the charge. [Finding shortened]

97. The Air Force was aware of the use of electronic speckle pattern interferometry because reference materials concerning this technique had been published in professional journals and available to the public as early as 1971. [Finding shortened]

99. Brower and Gampel felt the charges should be withdrawn.

100. Kehl and Steele continued with their tenacious contentions of impropriety and opposed the withdrawal of charges.

101. On March 22, 1988, Col Thomas, [KAFB Commander] approved Brower's recommendation and the charges were withdrawn.

104. On March 28, 1988, Steele called an anonymous fraud, waste, and abuse hot line run by the Air For Systems Command Inspector General (AFSCIG) and reported alleged improprieties concerning Gowan's business dealings. Steele's report on the anonymous hot line was made after the [OSI] investigation had long been closed and after the charges against Gowan had been withdrawn.

111. From October 20, 1987 through April 14, 1989, Gowan made a series of twenty-three formal requests for information.

138. The preferral of charges against Gowan became a widespread topic of conversation and speculation at KAFB.

147. Anne Turner Rollins explained that, before 1988, the Air Force did not permit a statement of disagreement or amendment when the subject of an objection was an

opinion or subjective belief. The only entity that could change subjective type material was the... AFBCMR. The policy was changed in 1990 and a statement of disagreement may now be lodged.

148. On March 1, 1989, the Secretary of the Air Force...amended two statements in the [Nameth] letter and sent the amended information to Nunn. The remainder of Gowan's request to amend was denied.

150. On March 31, 1989, the Secretary denied Gowan's request to place his statement of disagreement with the Nameth letter, and, alternatively, referred Gowan to AFBCMR.

166. Since MACJA released the Steele [IG] complaint, that office should have processed the amendment request.

177. On January 13, 1994, Gowan was finally given the attorney work file that he had requested October 19, 1988. Gowan had never been told that it was being withheld.

183. The AFBCMR typically takes six to eight months to process a request.

184. Burton acknowledged that with respect to Gowan's requests, it took four and a half years.

185. Gowan's requests for correction of records were not timely processed and Burton acknowledges that Gowan's requests "fell through the cracks.".

187. The AFBCMR changed the OSI report to identify who, in fact, was interviewed.